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IN THE
Supreme Court of the United States

October Term, 1977

No. **77-1265**

THE MARQUETTE NATIONAL BANK OF MINNE-
APOLIS,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION and
STATE OF MINNESOTA,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA**

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FIRST OF OMAHA SERVICE CORPORATION and
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Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MINNESOTA**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Minnesota entered in the above case on December 14, 1977.

OPINION BELOW

The Findings of Fact, Conclusions of Law and Order for Partial Summary Judgment, and Memorandum opinion, of the District Court for the Fourth Judicial District, State of Minnesota is unreported and appended hereto (App. D).¹ The opinion of the Supreme Court of the

¹Appendix, *infra* at page A— (hereinafter referred to as "App. —").

State of Minnesota in favor of respondent is reported at — N.W. 2d — and appended hereto (App. F). The Order of the Supreme Court of the State of Minnesota denying petition for rehearing and amending the original opinion is reported at — N.W. 2d — and appended hereto (App. G).

JURISDICTION

The judgment of the Supreme Court of the State of Minnesota was made and entered on December 14, 1977 (App. H) pursuant to the opinion rendered by said Court on November 10, 1977 (App. F) and the Order dated December 8, 1977 (App. G) denying petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Petitioner, The Marquette National Bank of Minneapolis, sought to enjoin the First National Bank of Omaha (Omaha Bank) and its wholly-owned subsidiary, First of Omaha Service Corporation, respondent herein, from issuing BankAmericard credit cards to residents of the State of Minnesota. The Omaha Bank in its BankAmericard program imposes an annual interest rate of 18 percent on unpaid balances of less than \$1,000, which is computed upon the previous balance of the customer's account. The Minnesota Bank Credit Card Act, Minnesota Statutes §48.185, prohibits banks conducting bank credit card programs in Minnesota from charging an interest rate of more than 12 percent per annum and interest is to be computed on an amount no greater than the average daily balance of the customer's account. Also, banks are al-

lowed in Minnesota to impose an annual membership fee of not more than \$15. For procedural reasons, not herein relevant, petitioner dismissed its complaint against the Omaha Bank, leaving only the First of Omaha Service Corporation as defendant. The Hennepin County District Court, State of Minnesota, entered judgment permanently enjoining respondent from soliciting BankAmericard customers on behalf of the Omaha Bank in Minnesota in contravention of the provisions of Minnesota Statutes, §48.185. The Minnesota Supreme Court reversed, holding under §85 of the National Bank Act (12 U.S.C., §85) that a national bank may charge its nonresident credit card customers an interest rate on unpaid balances allowable in the state where the national bank is located or the interest rate of the state where it is doing business, whichever is higher. The question presented is:

Whether the National Bank Act (12 U.S.C. §85) preempts Minnesota Statutes §48.185 and prohibits the State of Minnesota from regulating the interest rate charged Minnesota residents under a bank credit card program conducted within the State of Minnesota by a national bank having its principal place of business in a foreign state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions involved are Article VI, Clause 2 of the United States Constitution (App. A); the National Bank Act, Title 12, United States Code, Section 85 (App. B); and, the Minnesota Bank Credit Card Act, Minnesota Statutes 1976, Section 48.185 (App. C).

STATEMENT OF THE CASE

Petitioner is a national banking association established in the State of Minnesota and operates a bank credit card program (hereinafter referred to as the "Marquette BankAmericard program") in that state. Respondent² First of Omaha Service Corporation is a wholly-owned subsidiary of the Omaha Bank, a national banking association established in the State of Nebraska, which also commenced a bank credit card program (the "Omaha BankAmericard program") in the State of Minnesota.

Petitioner brought suit in May, 1976, under Minn. St. §48.185 to enjoin respondent and its parent, the Omaha Bank, from enrolling Minnesota residents in the Omaha Bank's BankAmericard program, without conforming its interest rate structure to that established by the Minnesota Bank Credit Card Act, Minn. St. §48.185 (App. C). Under this statute, a state or national bank, wherever located, when operating a bank credit card program in the State of Minnesota and soliciting Minnesota residents, is limited to imposing on credit card balances of Minnesota residents an annual interest rate of not more than 12 percent per annum, computed on the "average daily balance" of the customer's account. A bank under Minnesota law may also charge an annual membership fee of \$15. The Omaha Bank's BankAmericard program is structured under Nebraska law and provides for an annual interest rate of 18 percent on the first \$999.99. This interest rate (1½ percent per month) is imposed on the previous balance of the customer's account.

²Although listed as a respondent in the caption to this petition pursuant to Supreme Court Rule 21(4), the State of Minnesota was an intervenor in support of petitioner's action below. Unless otherwise indicated, "respondent" as used herein refers to the First of Omaha Service Corporation.

The Omaha Bank and its wholly-owned subsidiary, respondent, sought to conduct bank credit card operations in the State of Minnesota because of the opportunity afforded by the rate differential to establish a cardholder base in the State of Minnesota. Minnesota banks under the Minnesota Bank Credit Card Act are limited to charging an annual interest rate of 12 percent but are permitted to charge, in addition, an annual membership fee of \$15. The Omaha Bank and respondent proceeded to solicit Minnesota residents for purposes of enrolling them in the Omaha BankAmericard program by offering the BankAmericard credit card "free." By offering the card "free," rather than with a membership fee, the Omaha Bank hoped to attract many Minnesota residents to the Omaha BankAmericard program, who would otherwise have been required under Minnesota law to pay a fee for the privilege of obtaining a BankAmericard. The Omaha Bank could afford to offer the card "free" because of the Nebraska annual interest rate of 18 percent.

The Omaha Bank sought to have the action, originally commenced in Hennepin County District Court, removed to Federal District Court. Petitioner, for procedural reasons, dismissed its action against the Omaha Bank, but left standing its action against respondent. The United States District Court, State of Minnesota, found no federal removal jurisdiction and remanded the matter back to Hennepin County District Court, State of Minnesota. Petitioner then brought a motion for partial summary judgment before the Hennepin County District Court, State of Minnesota, to have the Omaha BankAmericard program declared in violation of Minn. St. §48.185 and to permanently enjoin respondent from engaging in any activity in

connection with the offering or operation of said credit card program in further violation of the statute. In defense to this motion, respondent raised the federal question presented herein, *i.e.* whether the National Bank Act, 12 U.S.C. §85, preempts Minn. St. §48.185 and enforcement of the provisions of such statute against the Omaha BankAmericard program. Upon being notified of this constitutional challenge to Minn. St. §48.185, the Attorney General for the State of Minnesota intervened as a party plaintiff and joined in petitioner's prayer for a declaratory judgment and permanent injunction.

Section 85 of the National Bank Act (12 U.S.C. §85) provides in pertinent part:

"Any [national banking] association may . . . charge on any loan or discount made . . . interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter." (App. B).

Respondent argued that this section gives a national bank located in Nebraska but doing business in Minnesota the right to charge in Minnesota the highest rate of interest permitted by the laws of the State of Nebraska; and that 12 U.S.C. §85 preempts that portion of Minn. St. §48.185 which makes Minnesota bank credit card interest rates applicable to foreign banks, including national banks, doing business in the State of Minnesota.³

³That portion of Minn. St. §48.185 which makes Minnesota bank credit card interest rates applicable to foreign banks doing business in Minnesota provides as follows:

Subd. 6. *This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an*

The District Court rejected the above argument of federal preemption and entered judgment in behalf of petitioner and against respondent on February 18, 1977. The District Court held, among other things, that (1) nothing in 12 U.S.C. §85 preempts the application and enforcement of Minn. St. §48.185 against respondent and the Omaha BankAmericard program; (2) the Omaha BankAmericard program is in violation of Minn. St. §48.185 by providing for the collection of interest in excess of 1 percent per monthly (18 percent annual rate); and (3) respondent is permanently enjoined from soliciting Minnesota residents for the purposes of enrolling them in the Omaha Bank's BankAmericard program or otherwise engaging in bank credit card activities in the State of Minnesota in violation of Minn. St. §48.185. *See App. D.*

The District Court in rejecting respondent's argument that 12 U.S.C. §85 preempted Minn. St. §48.185 and the operation thereof, stated:

open end loan account or other open end credit arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:

- (a) that the law of another state shall apply;
- (b) that the person consents to the jurisdiction of another state; and
- (c) which fixes venue

is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction. (Emphasis added.) (App. A-5).

"Since the founding of our republic, Congress, by its legislation, has allowed states to set their own interest rates. By their position in this case, the defendants are arguing that they have a right to export Nebraska's high interest rate into the State of Minnesota. This court, in its Order of December 22, 1976, said:

"To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic.'" (App. A-20).

On appeal to the Minnesota Supreme Court, respondent again argued that 12 U.S.C. §85 preempted the application of Minn. St. §48.185 to the Omaha BankAmericard program. In an opinion filed on November 10, 1977 (App. F), the Minnesota Supreme Court reversed the District Court decision on the basis of federal preemption of Minn. St. §48.185 by Section 85 of the National Bank Act (App. B). The Minnesota Supreme Court did not find any disharmony between Minn. St. §48.185 and the objectives of Congress in enacting §85 of the National Bank Act. To the contrary, the Court conceded that its decision to permit the Omaha BankAmericard program to collect 18 percent interest in violation of Minn. St. §48.185 would result in an advantage to out-of-state national banks which is inconsistent with the purposes of the National Bank Act:

"Thus, by allowing a national bank to transport a given interest rate under these circumstances could

afford it a distinct advantage in competing with state banking institutions, *an advantage which appears to be contrary to the original purpose in adopting this particular section [85] of the National Bank Act.*" (Emphasis added.) (App. A-44.)

* * *

"A national bank engaged in the interstate business of credit card financing should not be able to avoid the provisions of Minnesota law relating to allowable interest rates. *The granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest of the state in protecting its citizens from excessive financing charges.*" (Emphasis added.) (App. A-45.)

The Minnesota Supreme Court's refusal to enforce Minn. St. §48.185 against the Omaha BankAmericard program was *not* out of a belief that the state statute was an obstacle to the purposes of §85 of the National Bank Act. Rather, the Minnesota Supreme Court was reluctant to reach a result which it thought would be inconsistent with two United States Court of Appeals' decision involving the operation of bank credit card programs in the State of Iowa by out-of-state national banks. *See, Fisher v. First National Bank of Omaha*, 548 F. 2d 255 (8th Cir. 1977) and *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7th Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977). The Minnesota Supreme Court gave the following explanation for its decision:

"Thus, we have a situation where the Eighth Circuit Court of Appeals, which includes the State of Minnesota, has adopted with approval the view of the Seventh Circuit that a national bank can charge its

credit customers an interest rate allowable in the state where it is physically located, or the interest rate of the state where it is doing business, whichever is higher." (App. A-40.)

* * *

"In a well-reasoned memorandum accompanying its order, the district court discussed and interpreted the Fisher cases in light of the factual situation of the present case and determined those cases to be inapplicable as there did not exist a statute setting a credit card rate of interest in any of the states involved. The court concluded that while 12 U.S.C. §85 precludes states from discriminating against lenders as a class, it does not prohibit a state from establishing classes of loans which are applied uniformly to all banks doing business in the state. *If we were writing on a clean slate, this reasoning would appear to be more consistent with the history and purpose of the National Bank Act.*" (Emphasis added.) (App. A-41.)

In view of the *Fisher* cases, *supra*, the Minnesota Supreme Court reversed the District Court, held that 12 U.S.C. §85 preempted Minn. St. §48.185 and that based on §85, a national bank may charge its nonresident credit card customers an interest rate on unpaid accounts allowable in the state where it is located, or the interest rate of the state where it is doing business, whichever is higher.

Three justices of the Minnesota Supreme Court entered dissents to the majority opinion (App. F). Justice Scott, writing for the minority, stated:

"I respectfully dissent. The original purpose of 12 U.S.C.A., §85, of the National Bank Act was to prohibit states from discriminating against national banks in favor of local financial institutions. It was

intended to put 'national banks on a equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders.' First National Bank in Mena v. Nowlin, 509 F. 2d 872, 880 (8th Cir. 1975). Section 85 thus was intended to insure *intrastate* competitive equality among state lenders and national banks.

The Fisher decisions and the majority of this court interpret §85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act." (App. A-45.)

On December 8, 1977, the Minnesota Supreme Court denied a petition for rehearing but granted petitioner a stay of judgment pending this application for writ of certiorari (App. G.) Judgment was entered on December 14, 1977 (App. H.)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The decision below rendered by the Minnesota Supreme Court should be reviewed because it erroneously interprets §85 of the National Bank Act. The decision raises a novel and important question regarding construction of §85 of the National Bank Act which has not been passed upon

by the United States Supreme Court. The holding of the Minnesota Supreme Court that §85 prohibits the State of Minnesota from regulating interest rates imposed by out-of-state national banks on Minnesota consumers is contrary to the plain meaning of §85, conflicts with the legislative history thereof, and leads to absurd results. Such a construction places Minnesota state and national banks at a competitive disadvantage with respect to out-of-state national bank credit card operations and destroys the fragile balance of competitive equality heretofore maintained under our dual national-state banking system.

I.

The Ruling of the Minnesota Supreme Court Should be Reviewed Because the Ruling of Preemption Conflicts with the Congressional Policy of Competitive Equality as to Interest Rates Charged by National and State Banks Underlying 12 U.S.C. §85

The first clause of 12 U.S.C. §85 provides:

"Any [national banking] association may . . . charge on any loan or discount made . . . interest at the rate allowed by the laws of the State . . . where the bank is located . . . and no more. . . ." (App. A-2.)

This portion of §85 permits a national bank *located* in a state to charge on loans *made* in such state the rate permitted to *general lenders* under the general usury laws of the state. The second clause:

". . . except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for

associations organized or existing in any such State under this chapter." (App. A-2.)

of §85 permits a national bank *located* in a state to charge on loans *made* in that state the highest rate permitted to *state banks* in such state.

The legislative history reveals that the second clause in the statute was designed to preclude the states from passing legislation giving state banks the right to charge higher rates of interest than competing national banks. *See, Cong. Globe*, 38th Cong., 1st Sess., pp. 2123-27 (1864). This intent to insure competitive equality between state and national banks was first confirmed by the United States Supreme Court in the following discussion of §85, in the case of *Tiffany v. Bank of Missouri*, 85 U.S. (18 Wall.) 409 (1873):

"It cannot be doubted, in view of the purpose of Congress in providing for the organization of national banking associations, that *it was intended to give them a firm footing in the different states where they might be located. It was expected they would come into competition with state banks, and it was intended to give them at least equal advantages in such competition.* In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar state institutions. This was considered indispensable to protect them against possible unfriendly state legislation. Obviously, *if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same.*" (Emphasis added.) *Id.* at 412.

Section 85, however, was aimed at *intrastate* competition, *i.e.* between national banks located in a state and the other local banks in *that state*:

"The meaning of these provisions is unmistakable. A national bank may charge interest at the rate allowed by the laws of the state or territory where it is located; and *equality* is carefully secured *with local banks*." (Emphasis added.) *Daggs v. Phoenix National Bank*, 177 U.S. 549, 555 (1900).

This same emphasis on *intrastate* competitive equality between national banks and other local banks is seen in the other leading cases cited under §85. *See, e.g., First National Bank in Mena v. Nowlin*, 509 F. 2d 872 (8th Cir. 1975); *Northway Lanes v. Hackley Union National Bank & Trust Co.*, 464 F. 2d 855 (6th Cir. 1972); *Hiatt v. San Francisco National Bank*, 361 F. 2d 504 (9th Cir. 1966).

As the Eighth Circuit Court of Appeals stated in *First National Bank in Mena v. Nowlin*, *supra*:

"The Act reflects a Congressional compromise giving national banks full and complete parity of interest rate regulation with state banks while guarding against unfriendly anti-federal state legislation or ruinous competition with state banks. * * * The policy of the pro-national bank faction in Congress in fashioning the Act was to place national banks in a position of limited advantage over state banks by *allowing them to charge interest at the highest rate applicable under state law to lenders generally in each respective state*, not necessarily at the rate applicable to state banks which might be lower." (Emphasis added.) *Id.* at 879.

* * *

"The policy of *competitive state-federal equality in the context of usury regulation* is supported by the District Court's construction of §85 which imposes the same interest ceiling on national banks as on most favored lenders in the state, and thereby puts national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders." (Emphasis added.) *Id.* at 880.

As the above quotations clearly indicate, the key consideration of §85 is one of providing "competitive equality" in the context of *intrastate* competition between national banks and other lending institutions in the same state. Section 85 itself says nothing which could reasonably be construed as providing a rule as to what interest rate may be charged by national banks in the context of *interstate* transactions. The federal statute is simply silent on the issue.

Furthermore, there is nothing in the legislative history of the National Bank Act to indicate that §85, enacted over 100 years ago, was intended in any way to cover the situation of the *interstate* transactions present here where a national bank established in Nebraska is competing with banks and lenders in Minnesota. As an example, Senator Sherman from Ohio, a principal supporter of the development of a strong national banking system, in the Senate debate on §85 of the National Bank Act, commented as follows:

"My own preference, however, as I have already stated, is to establish a uniform rate of interest by our law; but having been overruled on that point, *I prefer now to place the national banks in each*

state on precisely the same footing with individuals and persons doing business in the State by its own laws." (Emphasis added.) *Cong. Globe*, 38th Cong., 1st Sess. 2123, 2126 (1864).

Congress in enacting §85 of the National Bank Act sought to preserve competitive equality between national banks and state banks. *See*, Comment, 58 Iowa L. Rev. 1250-67, on legislative history of §85 of the National Bank Act. The Minnesota Supreme Court in construing §85 as preemptive of state law regulating interest rates which national banks may impose when they come into the State of Minnesota is directly contrary to such an intention.

II.

The Ruling of the Minnesota Supreme Court Should be Reviewed in that the Ruling of Preemption Conflicts with the Plain Meaning of §85 of the National Bank Act

Section 85 of the National Bank Act is completely silent on the question of what rate of interest a national bank may charge when it crosses state lines. As indicated, 12 U.S.C. §85 provides in pertinent part:

"Any [national banking] association may . . . charge on any loan or discount *made* . . . interest at the rate allowed by the laws of the State . . . where the bank is *located* . . . and no more, except that where by the laws of any State a different rate is limited for banks *organized* under State laws, the rate so limited shall be allowed for *associations organized* or *existing* in any such State under this chapter." (Emphasis added.) (App. A-2.)

The first clause of §85 must be read to refer to the interest rate which may be charged by a national bank on loans *made* where the bank is *located* and would allow a national bank to charge the highest interest rate allowed to general lenders by the laws of the state in which the national bank is "located." The word "located" used in §85 when read in conjunction with the word "established" used in 12 U.S.C. §81 means the state where the national bank is chartered and transacts its general banking business. Section 85, as do many other provisions of the National Bank Act, makes national banks, in important aspects, peculiarly local institutions. *See*, 12 U.S.C. §§30, 33, 34a, 36, 51, 62, 72, 81, 85, 86 and 94; *Cope v. Anderson*, 331 U.S. 461, 467 (1947); *Citizens & Southern National Bank v. Bougas*, — U.S. —, 98 S. Ct. 88 (1977).

The second clause of §85 permits a national banking association "organized" or "existing" in any state to charge the highest rate permitted state banks in such state, if the rate for state banks is higher than the interest rate allowed general lenders in such state. Neither clause nor any other clause in §85 of the National Bank Act addresses the issue of what interest rate is permitted of national banking associations "located", "organized", or "existing" in one state and doing business in a second state. Use of such words as "located", "organized", and "existing" in §85 all appear to have reference to the same thing, that is, the state where the national bank was chartered and has its general place of business. Hence, §85 is completely silent on what rate of interest a national bank may charge when it crosses state lines and makes a loan in a state other than the state where it was chartered. *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62 (E.D. La.

1969); *Colorado National Bank of Denver v. Coder*, No. 34682 (Mont. Dist. Ct. 1972) (App. I.)⁴

III.

The Minnesota Supreme Court Decision Should be Reviewed in that its Reliance on the Fisher Cases for Purposes of Finding that §85 of the National Bank Act Preempts Minn. St. §48.185 is Misplaced

The majority of the Minnesota Supreme Court failed to perceive that the instant case is one of first impression and involves considerations entirely different than those addressed by the Eighth and Seventh Circuits in the *Fisher* cases. What is at stake in the instant case is a determination of whether §85 of the National Bank Act is to be construed as permitting competitive inequality be-

⁴It must be noted that the United States Supreme Court in *Citizens & Southern National Bank v. Bougas*, *supra*, in construing the meaning of the word "located" as found in the National Bank Act venue provision, 12 U.S.C. §94, held that a national bank for venue purposes was "located" not only in the county of the national bank's principal place of business but also in any county in which a national bank conducts business at a branch. Assuming the words "located" and "existing" as found in §85 of the National Bank Act mean essentially the same thing, even if those words are to be given an expanded reading so as to mean the place where the national bank has its principal of business or the place where the national bank conducts any significant business, §85 cannot be read to permit a national bank to export the interest rates of the state where it has its principal place of business (home state) across state lines to a foreign state when it engages in interstate transactions. Under an expanded reading of the words "located" or "existing", a national bank engaged in intrastate transactions would be deemed "located" or "existing" in its home state under §85 and the national bank would refer to the laws of such state for purposes of determining what interest rates may be charged. A national bank engaged in interstate transactions would be deemed "located" or "existing" in the foreign state under §85, if it conducts significant business there, and the national bank would refer to the laws of that state for purposes of determining what interest rates may be charged. The results then are the same in terms of whose state laws one looks to, whether one gives the words "located" and "existing" a narrow or broad interpretation under §85.

tween national banks established in different states but conducting business in the same state. It also involves a determination of whether §85 of the National Bank Act preempts a state from enacting nondiscriminatory legislation applicable to *all* banks operating bank credit card programs within its borders.⁵ These are highly significant and important issues not previously addressed by this or any other court. Furthermore, the Minnesota Supreme Court has reached a result herein which is contrary to its own view of the purposes of the National Bank Act. Its decision was based not upon the merits of the issues presented nor upon the federal preemption standards established by this Court, but upon a misguided notion of how the Eighth Circuit Court of Appeals would have decided the matter.

The *Fisher* cases involved an Iowa resident who commenced two separate class action suits, one against the First National Bank of Chicago and the other against the First National Bank of Omaha, for alleged antitrust and civil rights violations, and statutory damages (under 12 U.S.C. §86) of twice the amount of interest paid by cardholders in Iowa in connection with BankAmericard programs operated by the two banks in the State of Iowa. At the trial court level, judgment was entered against Fisher in both cases on grounds unrelated to federal preemption.⁶ On appeal, the Seventh and Eighth Circuits

⁵That such legislation is constitutionally permissible, absent preemption by federal law, *see, Alden's, Inc. v. Packel*, 524 F. 2d 38 (3rd Cir. 1975), *cert. denied*, 425 U.S. 943 (1976); *Alden's, Inc. v. LaFollette*, 552 F. 2d 745 (7th Cir. 1977), *cert. denied*, — U.S. — (1977).

⁶*See, Fisher v. The First National Bank of Chicago*, No. 74C489 (N.D. Ill. 1975) (unreported), 538 F. 2d *supra* at 1287-88; *Fisher v. The First National Bank of Omaha*, No. 72-0-156 (D. Neb. 1975) (unreported), 548 F. 2d *supra* at 256-57.

cited various reasons for affirming the respective lower court decisions, including the fact that the interest charged by the two banks was within the permissible rates of the State of Iowa as well as the national banks' home states of Illinois and Nebraska. *See*, 538 F. 2d at 1290 and 548 F. 2d at 258. In addition, both appellate courts sought to justify their decisions on the theory that the "most favored lender" doctrine announced in *Tiffany v. National Bank of Missouri*, *supra*, should be expanded to interstate transactions so as to give national banks the privilege of selecting between the highest rate of interest permitted by the state in which it has its principal place of business, or, the highest rate of interest permitted by the state in which the bank transacts business. *See*, 538 F. 2d at 1291; 548 F. 2d at 257-58. *Contra*, *Meadow Brook National Bank v. Recile*, *supra*; *Colorado National Bank of Denver v. Coder*, *supra*.

The *Fisher* cases are, in the first instance, distinguishable from the present case in that the respective courts in those cases found the interest rates charged by the subject bank credit card programs to be within the maximum rates of *both* the bank's home state and the transaction state. That is not the situation here.

Likewise, the courts in the *Fisher* cases were not dealing with a state statute specifically setting interest rates to be charged on all bank credit card programs operated in the state as a distinct class of loans. In regulations issued by the Comptroller of the Currency as to §85, it is provided that national banks may charge the highest rate of interest permitted "on a specified class of loans . . . subject only to the provisions of State law relating to such class of loans that are material to the determination

of the interest rate." 12 C.F.R. §7.7310. As noted by the District Court herein:

"* * * [T]he plain meaning of regulation 7.7310 indicates that states are allowed to discriminate as to classes of loans because everyone in the state is forbidden to make the loan and the principle of parity is not violated. Here, the State of Minnesota has set up a class of loan and designated it as a credit card rate. No one in the state is allowed to issue credit at a more favorable rate; to allow First Bank of Omaha to charge a higher rate would violate the doctrine of parity." (App. A-24.)

More importantly, from the standpoint of the petition for writ of certiorari herein, neither the Seventh nor the Eighth Circuit Court was faced in *Fisher* with the critical issue of whether to permit competitive inequality between national banks doing business in the same state. Accordingly, the *Fisher* cases cannot be viewed as authority for the proposition that §85 of the National Bank Act should be permitted to be utilized by a Nebraska-based national bank as a means of coming into the State of Minnesota and importing its home state's higher interest rates when Minnesota-based national banks are limited to the rate permitted by Minn. St. §48.185.

IV.

The Minnesota Supreme Court's Construction of §85 of the National Bank Act Should be Reviewed, in that it Leads to Absurd Results with Respect to Maintaining Competitive Equality Between National and State Banks

Congress in enacting §85 of the National Bank Act sought to maintain competitive equality between national

banks and state banks in terms of the interest rates chargeable. The Minnesota Supreme Court decision, if allowed to stand, allows respondent, and its principal, the Omaha Bank, to operate a BankAmericard program in Minnesota at an 18 percent interest rate per annum. Respondent can operate profitably at 18 percent without the need to impose a membership fee. Minnesota state banks and national banks located in Minnesota are limited to imposing an annual interest fee of 12 percent plus a \$15 annual membership fee. National banks located outside of the State of Minnesota by offering their bank credit card "free" (without a membership fee of \$15 per annum) have a substantial, illegal competitive advantage over petitioner and all other state and local national banks operating bank credit card programs in this state.

To construe §85 of the National Bank Act so as to find in the plain language of that Act a rule that national banks located in a high-interest-rate state may, by virtue of the National Bank Act, export such rates to a low-interest-rate state completely ignores the policy of "competitive equality" between national and state banks as to interest rates which Congress so carefully built into §85 of the Act.

If a national bank is located in a state which permits high interest rates, it will have a competitive advantage over national and state banks located in a neighboring state with a lower interest rate when it makes loans in that neighboring state. The construction given by the Minnesota Supreme Court of §85 of the National Bank Act not only creates competitive inequality between national banks in a state with high interest rates and state banks located in a low-interest-rate state, but it also results in creating com-

petitive inequality between national banks located in a high-interest-rate state and national banks located in a low-interest-rate state. As the dissent in the Minnesota Supreme Court decision states:

"The Fisher decisions and the majority of this court interpret §85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act." (App. A-45.)

CONCLUSION

Petitioner respectfully requests that the United States Supreme Court grant this petition for writ of certiorari to review the decision of the Minnesota Supreme Court, in that its decision construing §85 of the National Bank Act prohibits the State of Minnesota from regulating interest rates charged its citizens, is contrary to the plain meaning and legislative history of §85 of the National Bank Act, and destroys the doctrine of competitive equality as to interest rates chargeable by national banks and state

banks which Congress sought to effect by enacting §85 of the National Bank Act.

Respectfully submitted,

LEVITT, PALMER, BOWEN, BEARMON
& ROTMAN

By JOHN TROYER

and

J. PATRICK McDAVITT

*Attorneys for Petitioner The Marquette
National Bank of Minneapolis*

APPENDIX A

UNITED STATES CONSTITUTION, ARTICLE VI

Debts; supremacy; oath

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

APPENDIX B**TITLE 12, UNITED STATES CODE, SECTION 85**

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of

such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest. R.S. §5197; June 16, 1933, c. 89, §25, 48 Stat. 191; Aug. 23, 1935, c. 614, §314, 49 Stat. 711.

APPENDIX C

MINNESOTA STATUTES 1976, SECTION 48.185

Subdivision 1. Any bank organized under the laws of this state, any national banking association doing business in this state, and any savings bank organized and operated pursuant to Chapter 50 may extend credit through an open end loan account arrangement with a debtor, pursuant to which the debtor may obtain loans from time to time by cash advances, purchase or satisfaction of the obligations of the debtor incurred pursuant to a credit card plan, or otherwise under a credit card or overdraft checking plan.

Subd. 2. No bank shall extend credit which would cause the total outstanding balance of the debtor on accounts created pursuant to the authority of this section to exceed \$7,500. No savings bank shall extend credit which would cause the outstanding balance of the debtor to exceed \$5,000, nor shall it extend such credit for any purposes other than personal, family or household purposes, nor shall it extend such credit to any person other than a natural person.

Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

(a) Annual charges, not to exceed \$15 per annum, payable in advance, for the privilege of using a bank credit card which entitles the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank:

(b) Charges for premiums on credit life and credit accident and health insurance if:

(1) The insurance is not required by the bank or savings bank and this fact is clearly disclosed in writing to the debtor; and

(2) The debtor is notified in writing of the cost of the insurance and affirmatively elects, in writing, to purchase the insurance.

Subd. 5. If the balance in a revolving loan account under a credit card plan is attributable solely to purchases of goods or services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge shall be charged on the balance.

Subd. 6. This section shall apply to all open end credit transactions of a bank or savings bank in extending credit under an open end loan account or other open end credit

arrangement to persons who are residents of this state, if the bank or savings bank induces such persons to enter into such arrangements by a continuous and systematic solicitation either personally or by an agent or by mail, and retail merchants and banks or savings banks within this state are contractually bound to honor credit cards issued by the bank or savings bank, and the goods, services and loans are delivered or furnished in this state and payment is made from this state. A term of a writing or credit card device executed or signed by a person to evidence an open end credit arrangement specifying:

- (a) that the law of another state shall apply;
 - (b) that the person consents to the jurisdiction of another state; and
 - (c) which fixes venue;
- is invalid with respect to open end credit transactions to which this section applies. An open end credit arrangement made in another state with a person who was a resident of that state when the open end credit arrangement was made is valid and enforceable in this state according to its terms to the extent that it is valid and enforceable under the laws of the state applicable to the transaction.

Subd. 7. Any bank or savings bank extending credit in compliance with the provisions of this section, which is injured competitively by violations of this section by another bank or savings bank, may institute a civil action in the district court of this state against that bank or savings bank for an injunction prohibiting any violation of this section. The court, upon proper proof that the defendant has engaged in any practice in violation of this section,

may enjoin the future commission of that practice. Proof of monetary damage or loss of profits shall not be required. Costs and attorneys' fees may be allowed to the plaintiff, unless the court directs otherwise. The relief provided in this subdivision is in addition to remedies otherwise available against the same conduct under the common law or statutes of this state.

Service of process shall be as in any other civil suit, except that if a defendant in the action is a foreign corporation or a national banking association with its principal place of business in another state, service of process may also be made by personal service outside the state, or in the manner provided by section 303.13, subdivision 1, clause (3), or in such manner as the court may direct. Process is valid if it satisfies the requirements of due process of law, whether or not defendant is doing business in Minnesota regularly or habitually.

Added by Laws 1976, c. 196, §5, eff. April 9, 1976.

APPENDIX D

STATE OF MINNESOTA
County of Hennepin

DISTRICT COURT
Fourth Judicial District

THE MARQUETTE NATIONAL BANK OF MINNE-
APOLIS,

Plaintiff,

vs.

FIRST OF OMAHA SERVICE CORPORATION AND
CREDIT BUREAU OF ST. PAUL, INC.,

Defendants.

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND
ORDER FOR PARTIAL SUMMARY JUDGMENT**

Civil File No. 726526

The above-entitled matter was heard by the Court on January 7, 1977, on the Motion of plaintiff for Partial Summary Judgment or Temporary Injunction, and presented to the Court upon a Stipulation of Facts by the parties, Affidavit of Dale Harris, and all the files, records and proceedings herein. John Troyer and J. Patrick McDavitt of Levitt, Palmer, Bowen, Bearmon & Rotman appeared on behalf of plaintiff The Marquette National Bank of Minneapolis; Clay R. Moore of Mackall, Crounse & Moore appeared on behalf of defendant First of Omaha Service Corporation; and Rod McKenzie from the Office of the Attorney General appeared on behalf of Intervenor State of Minnesota.

Based upon the foregoing Motion, papers, files and ar-

guments presented, the Court now enters the following Findings of Fact, Conclusions of Law and Order for Partial Summary Judgment:

FINDINGS OF FACT

I.

The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card-issuing member in the BankAmericard plan, and as such has issued (prior to the entry of this Court's December 22, 1976 Temporary Restraining Order) and intends to issue (unless further enjoined) BankAmericard credit cards to Minnesota residents who qualify for them.

II.

Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its principal place of business is in Omaha, Nebraska, but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III below.

III.

Defendant First of Omaha Service Corporation intends to participate in the system by entering into agreements

with Minnesota merchants and Minnesota banks which will govern the participation of those merchants and banks in the system. While participating Minnesota banks will not have the authority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

IV.

The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks.

V.

Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the signed form for goods or services or cash from a participating Minnesota merchant or bank, respectively. The sales draft forms are then deposited by

the participating Minnesota merchant in his account with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

VI.

The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder's account. Such finance charges are assessed at the rate of 1 1/2 percent per month on the first \$999.99 of the customer's account for an annual percentage rate of 18 percent, and 1 percent a month on amounts of \$1,000 and more for an annual percentage rate of 12 percent. The finance charges assessed by the First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchase portion of the account balance when the previous month's total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

VII.

The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha.

ha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

VIII.

The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraphs III and IV above in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates would be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI above. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Revised Statutes of Nebraska, 1943, and Cumulative Supplement, Sections 8-815—8-823, 8-825—8-829, as added by Laws 1969, Chapter 21 (L.B. No. 52), as amended, and other laws of Nebraska which the defendant First of Omaha Service Corporation contends are permitted to be charged to Minnesota residents by virtue of the provisions of the National Bank Act, Title 12 U.S.C. §85.

IX.

Plaintiff The Marquette National Bank of Minneapolis ("Marquette") is asking for a temporary and permanent injunction restraining the defendant First of Omaha Ser-

vice Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

X.

Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them.

XI.

Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section 48.185, the plaintiff Marquette has assessed charges in connection with its BankAmericard credit card program in reliance on such Statute as follows: a \$10 annual charge for the privilege of using the card and, in addition, a finance charge equal to 1 percent per month (12 percent annual percentage rate). The finance charge of 1 percent per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's account during each monthly billing cycle; except that where the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the account is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance.

XII.

The First National Bank of Omaha's BankAmericard program as conducted and operated in the manner described above, has resulted and will continue to result in competitive injury to The Marquette National Bank of Minneapolis and its BankAmericard program. The First National Bank of Omaha is able to offer the aforesaid BankAmericard program to Minnesota residents without a membership fee, and thereby induce customers away from Marquette, only because of the imposition and collection of finance charges of 1 1/2 percent per month from First National Bank of Omaha's BankAmericard holders in Minnesota.

CONCLUSIONS OF LAW

I.

Nothing contained in the National Bank Act, 12 U.S.C. §85, precludes or preempts the application and enforcement of Minnesota Statutes, §48.185 to the First National Bank of Omaha's BankAmericard program as solicited and operated in the State of Minnesota.

II.

The laws of the State of Minnesota, not the laws of the State of Nebraska, apply in determining the rate of interest permitted to be charged and collected by the First National Bank of Omaha from BankAmericard holders residing in the State of Minnesota.

III.

The First National Bank of Omaha's BankAmericard

program, as offered and operated in the State of Minnesota, is in violation of Minnesota Statutes, §48.185, in that it provides for the collection of a periodic rate of finance charge in excess of 1 percent per month.

IV.

As agent of the First National Bank of Omaha in implementing said BankAmericard program and credit arrangement in the State of Minnesota, as the party that would enter into agreements with Minnesota merchants and Minnesota banks to participate in said BankAmericard program and credit arrangement, and by collecting interest from Minnesota residents under said Bank Americard program pursuant to assignments of delinquent accounts from the First National Bank of Omaha, defendant First of Omaha Service Corporation, in concert with the First National Bank of Omaha, has violated and threatens to continue to violate Minnesota Statutes, §48.185.

V.

The Marquette National Bank of Minneapolis, as a bank extending credit in compliance with Minnesota Statutes, §48.185, which has and will be injured competitively by violations of this statute, is entitled to a permanent injunction prohibiting any continued violation of said statute.

ORDER FOR PARTIAL SUMMARY JUDGMENT

There being no genuine issue as to any material fact, the Court does hereby order that, pursuant to Rule 56 of the Minnesota Rules of Civil Procedure, judgment be entered in favor of The Marquette National Bank of Minne-

apolis and against defendant First of Omaha Service Corporation permanently enjoining defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

The Court expressly determines under Rule 54.02 of the Minnesota Rules of Civil Procedure that there is no just reason for delay for the entry of said judgment and that it be entered by the Clerk accordingly.

Dated: February 18th, 1977.

/s/ RICHARD J. KANTOROWICZ
Judge of District Court

MEMORANDUM

Plaintiff is a bank chartered under the National Banking Laws located in the State of Minnesota and brings this action for a permanent injunction restraining the defendants from soliciting BankAmericard customers in the State of Minnesota in violation of Minnesota Statutes 48.185. Defendant, First of Omaha Service Corporation, is the soliciting agent for the First National Bank of Omaha. Under the arrangement, the First of Omaha Service Corporation will merely solicit customers. The loans and credit will be extended by the First National Bank of Omaha. Because the First National Bank of Omaha will not be soliciting customers in the State of Minnesota, they have not been joined as defendants at this stage of the proceedings.

Defendants are taking the position that First National Bank of Omaha, being chartered under the National Banking Act, enjoys all of the rights and privileges granted under that law and they may solicit business through its agents in Minnesota, offering interest rates which the First National Bank of Omaha could legally charge Minnesota residents.

The issue in this case is what is the legal rate of interest that the First National Bank of Omaha may charge Minnesota residents who subscribe to the BankAmericard plan offered by the First National Bank of Omaha.

The relevant provision of the National Banking Law is found in 12 U.S.C. §85.

"Any association (national bank) may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of State, Territory, or District where the bank is located . . . and no more, except that where by the laws of any State a different rate is limited for Banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter."

Under that provision of 12 U.S.C. §85, the United States Court, in 1873 (*Tiffany v. National Bank of Missouri*, 85 U.S. (18 Wall.) 409), evolved what became known as "most favored lender" doctrine. This doctrine provides that a national bank doing business in a state where it is not located may charge the highest rate of interest for that type of loan allowed by that state regard-

less of the type of lender. In other words, even though the state banks in that state were limited, a national bank could charge a higher rate if an individual person could charge a higher rate. The "most favored lender" doctrine was subsequently embodied in a regulation issued by the Comptroller of Currency in 12 C.F.R. §7.7310.

"CHARGING INTEREST AT RATES PERMITTED COMPETING INSTITUTIONS, CHARGING INTEREST TO CORPORATE BORROWERS.

- (a) A national bank may charge interest at the maximum rate permitted by State law to any competing State-chartered or licensed lending institution. If State law permits a higher interest rate on a specified class of loans, a national bank making such loans at such higher rate is subject only to the provisions of State law relating to such class of loans that are material to the determination of the interest rate. For example, a national bank may lawfully charge the highest rate permitted to be charged by a State-licensed small loan company or morris plan bank, without being so licensed.
- (b) A national bank located in a State the law of which denies the defense of usury to a corporate borrower may charge a corporate borrower any rate of interest agreed upon by such borrower."

Minnesota, by Minnesota Statute 48.185, has set up credit card loans as a separate loan entity and provides that a credit card customer may be charged a \$15.00 an-

nual service charge but shall not be charged a rate of interest in excess of 12% per annum (1% per month). The plaintiff in this case issues BankAmericard credit cards pursuant to a franchise it has with the National BankAmericard Company. However, it charges only a \$10.00 fee as a one year service charge.

Defendants claim that under 12 U.S.C. §85, they are permitted to charge Minnesota residents the interest rate allowed by Nebraska Law, the state where First National Bank of Omaha is located. The Nebraska rate for credit card transactions would be 18% per annum or one and one half percent per month. Defendants propose to issue Bank Americards with no yearly service charge but will be charging a rate of interest higher than allowed by Minnesota Statutes regulating credit card loans.

This Court, on December 22, 1976, issued a Temporary Restraining Order, restraining defendants from soliciting or offering a bank credit card program in the State of Minnesota, in violation of Minnesota Statutes, Section 48.185. An application was made to the Minnesota Supreme Court by defendants and the Supreme Court denied them the relief they requested and ordered them to go back to the District Court for further proceedings. This matter was heard by the Court on January 7, 1977, on stipulated facts. It was further stipulated that this was to be a trial on the merits for a permanent injunction. Defendants rely on a number of arguments, some of which can be disposed of, without great discussion.

First of all, defendants argue that their interest rate is not higher than allowed under Minnesota Statutes because of the allowable \$15.00 annual service charge. It is true that for customers who do not have very high credit

card charges the \$15.00 annual fee, when added as additional interest, makes it a higher rate. The interest rate at the low end of the scale would be higher. It is clear that defendants are not interested in small borrowers, however, and they are basically interested in the large users of credit cards and are more concerned with the large borrowers of money under the credit cards, and it is in this area that they would be violating the Minnesota Statutes. The fact that they would be de facto in compliance at the lower end of the interest scale does not help them if they are in non-compliance at the high end of the interest scale. In fact, the Court's Order of December 22, 1976, has never prohibited defendants from soliciting credit card customers. It merely prohibited them from soliciting credit card customers in violation of Minnesota Statutes 48.185. So, if defendants are not soliciting customers, it's only because they intend to charge an interest rate greater than Minnesota law allows.

Defendants make great argument about the intelligence and education of consumers in our community and how, if they, in fact, charge a higher interest rate, they could not exist in a competitive market. This flies in the face of all known facts. It is common knowledge and well documented that consumers cannot make these judgments and there has been a plethora of consumer protection laws evidencing the fact that the government must protect the consumers from complicated business practices. Minnesota Statutes 48.185 is part of our consumer protection laws and the argument that consumers can protect themselves is an argument of long, long ago.

Since the founding of our republic, Congress, by its legislation, has allowed states to set their own interest

rates. By their position in this case, the defendants are arguing that they have a right to export Nebraska's high interest rate into the State of Minnesota. This Court, in its Order of December 22, 1976, said:

"To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic."

A long standing acquiescence in an interpretation of a law by the community is recognized as a powerful principal of statutory construction. See Sutherland Statutory Construction. §49.06.

"The meaning which persons affected by an act and the public at large ascribe to it may nevertheless have an important bearing on how it should be construed.

'A practical construction given a statute by the public generally, as indicated by a uniform course of conduct over a considerable period of time, and acquiesced in and approved by a public official charged with the duty of enforcing the act, is entitled to great weight in the interpretation which should be given it, in case there is any ambiguity in its meaning serious enough to raise a reasonable doubt in any fair mind. . . .'"

Defendants are claiming by citing *Fisher v. First National Bank of Omaha*, Docket No. 75-1976 (8th Cir. January 28, 1977), and *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7th Cir. 1976), that the two Circuit Courts of Appeals are, in fact, allowing National Banks to export their interest rates into low interest states. A reading of those two cases by this Court does not sustain that contention. It should be pointed out that in both of the Fisher Cases, the Courts were not dealing with a statute setting a credit card rate of interest but were applying small loan rate of interest of consumer loan rate of interest because there was no credit card rate of interest in any of the states involved. Therefore, the Court in neither of the Fisher Cases was faced with a specific "credit card interest" rate, but felt it had the choice of applying other interest rates that it deemed appropriate to those situations. Because Minnesota has a credit card interest rate this creates a different situation because 12 C.F.R. 7.7310 identifies this as "such class of loans".

In both Fisher Cases and in all cases prior thereto, the courts have unanimously agreed that 12 U.S.C. 85 does not restrict national banks to state banking laws but no court has ever been faced with the proposition that we have here interpreting "such class of loans". Up until now the courts have had the freedom of defining credit card loans any way they wished, because no statute specifically provided for credit card loans. Now defendant argues that in the face of a credit card loan rate, it may still pick any rate it so desires. This, in fact, would negate all state usury laws. In effect, it would mean that national banks located in states with no usury laws could charge unlimited interest in any state of the United States. Such a

position would seem to fly in the face of the Federal Regulation 12 C.F.R. 7.7310, which embodied the most favored lender rate where the national bank cannot be restricted to class of lenders, but by Federal Regulation are restricted to "class of loans".

It is agreed that 12 U.S.C. §85 was enacted to prevent states from discriminating against national banks. Therefore, states who create a different interest rates between classes of lenders would not be allowed to restrict national banks from enjoying the highest lending interest rates regardless of what class of lender was involved.

The need for such a division is obvious in that if states permitted high interest rates to certain persons in the state and denied them to national banks, national banks could not compete on equal footing and enjoy the parity that the courts have given them.

However, when the state makes laws limiting interest rates as to types of loans, it means that no one in that state can make that loan; therefore, the national bank is no better off or no worse off, than other people within the state.

This concept is embodied in C.F.R. 7.7310, which allows a state to forbid certain classes of loans. This is obviously fair because no one in the state can make such a loan and there is no discrimination against national banks. The national bank enjoys full parity with all other lenders in the state.

The same concept was approved in *Fisher v. First National Bank of Omaha*, 8th Circuit, January 28, 1977, when that case quotes with approval the language in *Union Missouri Bank of Kansas City v. Danforth*, 394 F. Supp. 774 (S.D. Mo. 1975):

"Missouri has in effect made small loan companies licensed under that Chapter 'favored lenders' in the class of debt encompassed by the Retail Credit Sales Act. Plaintiffs, as national banks, are entitled to parity of interest charges with these lenders, notwithstanding the rates permitted to state chartered banks. To hold otherwise would be contrary to the congressional policy of assuring national banks parity with most favored state lenders and frustrate one of the primary objectives of the National Banking Act—competitive state-federal equality."

Heretofore, all of the decisions dealt with discrimination against classes of lenders. All of the cases cited by plaintiff forbid the same. However, the plain meaning of regulation 7.7310 indicates that states are allowed to discriminate as to classes of loans because everyone in the state is forbidden to make the loan and the principle of parity is not violated. Here, the State of Minnesota has set up a class of loan and designated it as a credit card rate. No one in the state is allowed to issue credit at a more favorable rate; to allow First Bank of Omaha to charge a higher rate would violate the doctrine of parity.

The 8th Circuit Court in *Fisher v. First Bank of Omaha* interpreted *Fisher v. First National Bank of Chicago* to mean that the foreign national bank is limited with respect to the class of loans designation set by the state.

"In the very recent case of *Fisher v. First National Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), it was held that under the provisions of §85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a

differential between ~~the~~ maximum rate allowable in one state and the maximum rate allowable in the other state with respect to *the same class of debt*, the bank may charge the higher of the two rates. (Italics supplied).

We find ourselves in agreement with that holding. And when it is applied to this case, it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for *the same class of loan* regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate. (Italics supplied).

In summary, states may not discriminate between classes of lenders but may discriminate between classes of loans and because Minnesota has set a separate and distinct credit card rate, there is no loss of parity by requiring the defendants to comply with that law.

JUDGE RICHARD J. KANTOROWICZ

APPENDIX E

United States District Court
 District of Minnesota
 Fourth Judicial District

The Marquette National Bank of Minneapolis,
 Plaintiff,

and

Warren Spannaus, Attorney General, State of Minnesota,
 Plaintiff-Intervenor,

vs.

First of Omaha Service Corporation, and Credit Bureau
 of St. Paul, Inc.,
 Defendants.

Judgment

February 22, 1977

The above entitled action having been regularly placed upon the calendar of the above named Court for the September 1976 General Term thereof, came on for trial before the Court on the 7th day of January, and the Court, after hearing the evidence adduced at said trial and being fully advised in the premises, did, on the 18th day of February 1977, duly make and file its findings and order for judgment herein.

Now, pursuant to said order and on motion of John Troyer, Esq., Attorney for Plaintiff,

IT IS HEREBY ADJUDGED AND DECREED:

1. That nothing contained in the National Bank Act, 12 U.S.C. §85, precludes or preempts the application and enforcement of Minnesota Statutes, §48.185 to the First National Bank of Omaha's BankAmericard program as solicited and operated in the State of Minnesota.

2. That the laws of the State of Minnesota, not the laws of the State of Nebraska, apply in determining the rate of interest permitted to be charged and collected by the First National Bank of Omaha from BankAmericard holders residing in the State of Minnesota.

3. That the First National Bank of Omaha's BankAmericard program, as offered and operated in the State of Minnesota, is in violation of Minnesota Statutes, §48.185, in that it provides for the collection of a periodic rate of finance charge in excess of 1 percent per month.

4. That as agent of the First National Bank of Omaha in implementing said BankAmericard program and credit arrangement in the State of Minnesota, as the party that would enter into agreements with Minnesota merchants and Minnesota banks to participate in said BankAmericard program and credit arrangement, and by collecting interest from Minnesota residents under said BankAmericard program pursuant to assignments of delinquent accounts from the First National Bank of Omaha, Defendant First of Omaha Service Corporation, in concert with the First National Bank of Omaha has violated and threatens to continue to violate Minnesota Statutes §48.185.

5. That the Marquette National Bank of Minnesota, as

a bank extending credit in compliance with Minnesota Statutes, §48.185, which has and will be injured competitively by violations of this statute, is entitled to a permanent injunction prohibiting any continued violating of said statute.

6. That there being no genuine issue as to any material fact, the Court does hereby order that, pursuant to Rule 56 of the Minnesota Rules of Civil Procedure, judgment is hereby entered in favor of The Marquette National Bank of Minneapolis and against Defendant First of Omaha Service Corporation permanently enjoining Defendant, First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, §48.185.

7. That the Court expressly determines under Rule 54.02 of the Minnesota Rules of Civil Procedure that there is no just reason for delay for the entry of said judgment.

BY THE COURT:

District Court Administrator
By /s/ B. ARTHUR
Deputy

APPENDIX F

HENNEPIN COUNTY

No. 250

The Marquette National Bank of Minneapolis,
Respondent,

vs. 47561

First of Omaha Service Corporation,
Appellant,

and

State of Minnesota, intervenor,
Respondent.

SYLLABUS

A national bank may charge its nonresident credit card customers an interest rate on unpaid accounts allowable in the state where it is located, or the interest rate of the state where it is doing business, whichever is higher.

Reversed.

Considered and decided by the court en banc.

OPINION

TODD, Justice.

The Marquette National Bank of Minneapolis (Marquette) sought to enjoin the First National Bank of Omaha (Omaha Bank) and its wholly-owned subsidiary, First of Omaha Service Corporation (Omaha Service) from issuing BankAmericard credit cards to the State of Minnesota.

The Omaha Bank program assessed customers an annual interest rate of 18 percent on unpaid balances of less than \$1,000, to be computed upon the prior month's balance of the individual account. The Minnesota Credit Card Act (Minn. St. 48.185)¹ sets a maximum interest rate of 12 percent per annum with the interest charge to be based on an amount no greater than the average balance of the individual account for the prior month. As a result of procedural actions, Omaha Service remains as the only defendant, but the matter was considered as though the Omaha Bank still remained as a defendant. The district court entered judgment permanently enjoining Omaha Service from soliciting BankAmericard customers on behalf of the Omaha Bank in Minnesota in contravention of the provisions of Minn. St. 48.185. We reverse.

Prior to the hearing on the matter, the parties agreed to a stipulation of facts which provides:

¹Minn. St. 48.185 provides in pertinent part: "Subd. 3. A bank or savings bank may collect a periodic rate of finance charge in connection with extensions of credit pursuant to this section, which rate does not exceed one percent per month computed on an amount no greater than the average daily balance of the account during each monthly billing cycle. If the billing cycle is other than monthly, the maximum finance charge for that billing cycle shall be that percentage which bears the same relation to one percent as the number of days in the billing cycle bears to 30.

"Subd. 4. No charges other than those provided for in subdivision 3 shall be made directly or indirectly for any credit extended under the authority of this section, except that there may be charged to the debtor:

"(a) Annual charges, not to exceed \$15 per annum, payable in advance, for the privilege of using a bank credit card which entitled the debtor to purchase goods or services from merchants, under an arrangement pursuant to which the debts resulting from the purchases are paid or satisfied by the bank or savings bank and charged to the debtor's open end loan account with the bank or savings bank."

"I.

"The BankAmericard plan is a national and international bank credit card system which enables cardholders to purchase goods and services from participating merchants and obtain cash advances from participating banks throughout the United States and the world. The First National Bank of Omaha, which is not a defendant herein, is a national bank with its charter address in Omaha, Nebraska, is a card issuing member in the BankAmericard plan, and as such has issued (prior to the restraining order) and intends to issue * * * BankAmericard credit cards to Minnesota residents who qualify for them.

"II.

"Defendant First of Omaha Service Corporation is a wholly-owned subsidiary of First National Bank of Omaha. Its principal place of business is in Omaha, Nebraska but it is authorized to transact business in the State of Minnesota and intends, unless restrained or enjoined, to transact business in the State of Minnesota in the manner set forth and described in Paragraph III of this Stipulation.

"III.

"Defendant First of Omaha Service Corporation will participate in the system by entering into agreements with Minnesota merchants and Minnesota banks which will govern the participation of those merchants and banks in the system. * * * While participating Minnesota banks will not have the au-

thority to issue cards or extend credit directly in connection with BankAmericard transactions, they will advertise the BankAmericard plan and solicit applications for BankAmericards from Minnesota residents which are then forwarded to First National Bank of Omaha for acceptance or rejection, and they will serve as a depository for BankAmericard sales drafts deposited by participating merchants with whom defendant First of Omaha Service Corporation has member agreements.

"IV.

"The First National Bank of Omaha has solicited and intends to solicit Minnesota residents on a continuous and systematic basis, in order to induce them to enroll in the First National Bank of Omaha's BankAmericard program. This solicitation program will be carried out by direct mail solicitation, telephone contact and through Minnesota banks. * * *

"V.

"Minnesota cardholders wishing to purchase goods and services or obtain cash advances with a BankAmericard issued by the First National Bank of Omaha, sign a BankAmericard form evidencing the transaction which is authenticated by the cardholder's BankAmericard credit card, and exchange the signed form for goods or services or cash from a participating Minnesota merchant or bank, respectively. The sales draft forms are then deposited by the participating Minnesota merchant to his ac-

count with a participating Minnesota bank for credit, which will then forward them and cash advance drafts drawn on such bank to the First National Bank of Omaha for credit.

"VI.

"The First National Bank of Omaha renders periodic statements to its Minnesota cardholders and charges finance charges on the unpaid balance of the cardholder's account. Such finance charges are assessed at the rate of 1-1/2% per month on the first \$999.00 of the customers account for an annual percentage rate of 18%, and 1% a month on amounts of \$1,000 and more for an annual percentage rate of 12%. * * * [T]he finance charges assessed by the First National Bank of Omaha are computed on the daily outstanding balance of cash advances and on the entire previous balance of purchases of goods or services before deducting any payments made during the billing cycle. No finance charges are imposed on the purchases portion of the account balance when the previous month's total balance is paid in full on or before the due date shown on the monthly statement. Minnesota cardholders may pay all of their account balance in full or defer payment by paying an installment thereof. Payments of account balances are remitted by Minnesota residents directly to the First National Bank of Omaha.

"VII.

"The defendant First of Omaha Service Corporation and participating Minnesota banks are or will be paid a fee for their services rendered to the First National Bank of Omaha. Defendant First of Omaha Service Corporation and the participating Minnesota banks do not directly receive interest. However, the First of Omaha Service Corporation does accept assignments of delinquent accounts from the First National Bank of Omaha, and as an incident to collecting these accounts, does collect interest.

"VIII.

"The defendant First of Omaha Service Corporation intends, unless further restrained or enjoined, to immediately commence solicitation of potential participating Minnesota banks and Minnesota merchants so that they may perform the functions described in Paragraph III and IV of this Stipulation in connection with the BankAmericard credit card program conducted by the First National Bank of Omaha. Interest rates will be assessed to Minnesota resident cardholders in the manner set forth in Paragraph VI of this Stipulation. Said interest rates are imposed by the First National Bank of Omaha in reliance on rates permitted in the State of Nebraska under Revised Statutes of Nebraska, 1943, and Cumulative Supplement, Secs. 8-815 - 8-823, 8-825 - 8-829, as added by Laws 1969, Chapter 31 (L.B. No. 52) as amended, and other laws of Nebraska, which the defendant First of Omaha Service Cor-

poration contends are permitted to be charged to Minnesota residents by virtue of the provisions of the National Bank Act, Title 12 U.S.C. § 85.

"IX.

"The plaintiff The Marquette National Bank of Minneapolis ('Marquette') is asking for temporary and permanent injunction restraining the defendant First of Omaha Service Corporation, and all persons acting as officers, employees or agents thereof, from engaging in any solicitation of residents of the State of Minnesota or other activity in connection with the offering or operation of a bank credit card program in the State of Minnesota in violation of Minnesota Statutes, Section 48.185.

"X.

"Plaintiff Marquette is a national bank with its main banking office in Minneapolis, Minnesota, is a card-issuing member in the BankAmericard plan and as such has issued and continues to issue cards to Minnesota residents who qualify for them. * * *

"XI.

"Since the enactment on April 8, 1976, of Chapter 196, Laws of Minnesota 1976, codified as Minnesota Statutes, Section 48.185, the plaintiff Marquette has assessed charges in connection with its BankAmericard credit card program in reliance on such Statute as follows: a \$10 annual charge for the privilege of using the card and, in addition a finance

charge equal to 1% per month (12% annual percentage rate). * * * [T]he finance charge of 1% per month assessed by plaintiff Marquette is computed on the average daily balance of the cardholder's amount during each monthly billing cycle, except that where the account balance is attributable solely to purchases of goods and services charged to the account during one billing cycle, and the amount is paid in full before the due date of the first statement issued after the end of that billing cycle, no finance charge is charged on that balance."

The procedural history of this case is significant. Marquette originally commenced an action in Minnesota district court against the Omaha Bank, Omaha Service and the Credit Bureau of St. Paul, Inc., alleging violations of the Minnesota Credit Card Act (Minn. St. 48.185), and the Minnesota Deceptive Trade Practices Act (Minn. St. 325.772); and seeking money damages and injunctive relief to restrain the defendant from solicitation in Minnesota for defendant's BankAmericard program. Since the Omaha Bank was a national bank, the case was removed to the United States District Court for Minnesota pursuant to 28 USCA, § 1441. Marquette thereafter dismissed Omaha Bank as a party defendant, resulting in the case being remanded back to the state district court because of a lack of Federal subject matter jurisdiction.² The case then proceeded solely against Omaha Service. However,

²If Marquette had not dismissed the Omaha Bank as a party defendant, the case would have undoubtedly been transferred to the United States District Court for Nebraska since a national bank can only be sued in the forum where it is established. See, *Radzanower v. Touche Ross & Co.*, 426 U. S. 148, 96 S. Ct. 1989, 48 L. ed. 2d 540 (1976).

because Omaha Service's function is limited to entering into agreements with merchants and local banks, and, since it does not have control over the issuance of credit cards or establishing the rate of finance charge, the case was treated as if the Omaha Bank was still the defendant.

The district court issued a permanent injunction against Omaha Service prohibiting the "solicitation of residents of the State of Minnesota or other activity in connection with * * * the operation of a bank credit program" which violates Minn. St. 48.185. In issuing the permanent injunction, the court held that while Federal law prevents states from enacting laws which discriminate against classes of lenders, it does not preclude states from discriminating against classes of loans. The principal issue presented on appeal is whether a state may regulate, by statute, the credit card interest rate charged by a national bank located in another state but conducting business within the regulating state.

National banks are regulated by the United States Congress. The amount of interest which a national bank may charge its customers is governed by 12 USCA, § 85, which provides in part:

"Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, *interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, * * **" (Italics supplied.)

The application of this section to interstate credit transactions has been recently considered by both the

Seventh and Eighth Circuit Courts of Appeals. In *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284 (7 Cir. 1976), certiorari denied, 429 U.S. 1062, 97 S. Ct. 786, 50 L. ed. 2d 778 (1977), the court addressed a situation in which a national banking association with its principal place of business in Illinois was charging Fisher, an Iowa resident, interest on the unpaid balance of his monthly BankAmericard statement at a rate allowable in Illinois. Fisher brought an action alleging that the Illinois bank was charging usurious interest to Iowa residents under its BankAmericard program. In permitting the Illinois bank to assess Illinois interest rates to Iowa resident users of the credit card, the court of appeals stated (538 F. 2d 1289):

"* * * The defendant here is located, established and organized in only Chicago, Illinois, and is subject therefore to the rate of interest 'allowed by the laws of the State' of Illinois. If we could stop there and only look at the first portion of § 85, we could easily conclude that the 18% per annum rate of interest allowed by the Illinois Revolving Credit Act, Ill. Rev. Stat., ch. 74, § 4.2 (1973), governs the rate chargeable by the defendant within Illinois and anywhere else that it might do business. The language is certainly broad enough to bear that interpretation. It refers to the interest on 'any loan or discount made' as being governed by the laws of the single state where the national bank can be located.

"* * * The crux of this case is what law governs when the Chicago-located national banking association does business in another state, here Iowa. * * *

* * * * *

"We would summarize the statute as it applies to this case as follows: Illinois' 18% per annum statute applies to *all* loans made by the defendant Illinois national banking association, whether made in Illinois or elsewhere, but if the defendant is 'existing' in Iowa and if Iowa allowed, which it apparently does not, a rate of interest to its own state banks in excess of 18%, the defendant could charge such higher rate to the defendant's customers in Iowa."³

After the action against the Illinois bank was in progress, the same plaintiff brought an almost identical action against the First National Bank of Omaha, challenging its right to charge Iowa resident customers of the Omaha BankAmericard program interest rates allowable in Nebraska. In *Fisher v. First National Bank of Omaha*, 548 F. 2d 255, 257 (8th Cir. 1977), the court of appeals, in denying the plaintiff's claim, stated:

³But see, *Meadow Brook National Bank v. Recile*, 302 F. Supp. 62, 73 (E. D. La. 1969), in which the court reasoned: "In effect, 12 U.S.C. § 85 provides that a national bank may charge interest at the rate allowed by the laws of the state where the bank is located. The question is whether this was meant to fix the rate of interest on *all* loans made by the bank or merely those loans made in that state. Admittedly, the above quoted language would seem to include all loans made by the bank and not solely those made in the state where the bank is located. * * *

* * * * *

"We hold that 12 U.S.C. § 85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another state."

This reasoning was disapproved by the Seventh Circuit in *Fisher v. First National Bank of Chicago*, 538 F. 2d 1284, 1290 (7 Cir. 1976), certiorari denied, 429 U. S. 1062, 97 S. Ct. 786, 50 L. ed. 2d 778 (1977): "We are not inclined to so twist the plain meaning of the statute. It clearly states that the interest on 'any loan' is governed by the rate allowed by the state 'where the bank is located,' which in this case is Illinois."

"* * * The question is whether under the National Bank Act we are required to apply the law of Nebraska or the law of Iowa to transactions which were initiated in Iowa but consummated in Nebraska. * * *

"* * * We are persuaded, however, that it really makes no difference whether the transactions are characterized as being Nebraska transactions or whether they are characterized as Iowa transactions.

"In the very recent case of *Fisher v. First Nat'l Bank of Chicago*, 538 F. 2d 1284 (7 Cir. 1976), it was held that under the provisions of § 85, if a national bank in one state makes a loan in another state in which it is doing business, and if there is a differential between the maximum rate allowable in one state and the maximum rate allowable in the other state with respect to the same class of debt, the bank may charge the higher of the two rates.

"We find ourselves in agreement with that holding. And when it is applied to this case, it is clear that the bank is entitled to charge on these transactions the highest permissible Nebraska rate for the same class of loan regardless of whether the loan is made in Nebraska or Iowa since the maximum rate allowable in Iowa is no higher than the maximum rate allowable in Nebraska. If Iowa permitted a higher rate, which it does not, the bank would be entitled to charge the higher rate."

Thus, we have a situation where the Eighth Circuit Court of Appeals, which includes the State of Minnesota,

has adopted with approval the view of the Seventh Circuit that a national bank can charge its credit customers an interest rate allowable in the state where it is physically located, or the interest rate of the state where it is doing business, whichever is higher. At this point, the procedural history of this case assumes a greater importance. It appears fairly obvious that if the Omaha Bank had remained as a party defendant, the Federal District Court for Minnesota or for Nebraska would have followed the opinion of the Eighth Circuit. By dismissing the Omaha Bank as a defendant, Marquette apparently intended to, and actually did, avoid a result that appeared to be predetermined if the case had remained in the Federal court system.

In reaching a decision to enjoin Omaha Service and, in practical effect, the Omaha Bank from operating their BankAmericard program in Minnesota in violation of § 48.185, the district court sought to distinguish the two Fisher cases. In a well-reasoned memorandum accompanying its order, the district court discussed and interpreted the Fisher cases in light of the factual situation of the present case and determined those cases to be inapplicable as there did not exist a statute setting a credit card of interest in any of the states involved. The court concluded that while 12 USCA, § 85, precludes states from discriminating against lenders as a class, it does not prohibit a state from establishing classes of loans which are applied uniformly to all banks doing business in the state. If we were writing on a clean slate, this reasoning would appear to be more consistent with the history and purpose of the National Bank Act.

The particular section of the National Bank Act under consideration in this case has been in existence for over a century. Obviously, the ramifications and problems resulting from bank credit card financing could not have been considered by Congress at the time of its adoption. Furthermore, a rather strong argument can be made that credit card financing is not purely banking business even though a bank may administer the program. The original version of the National Bank Act was enacted by Congress to protect national banks from discriminatory economic legislation by individual states in which the various national banks were located. The result of the Federal legislative efforts was to create what has commonly been referred to as a "most favored lender status" for national banks. *First National Bank in Mena v. Nowlin*, 509 F. 2d 872, 879 (8 Cir. 1975); *United Missouri Bank of Kansas v. Danforth*, 394 F. Supp. 774, 779 (W. D. Mo. 1975). In the landmark case of *Tiffany v. National Bank of Missouri*, 85 U. S. (18 Wall.) 409, 21 L. ed. 862 (1874), the laws of Missouri limited the amount of interest chargeable by banks organized under state laws to 8 percent but allowed all other persons in the state to assess a 10-percent interest charge upon credit transactions. Within this statutory scheme a national banking association organized and located in the State of Missouri charged its credit customers a 9-percent interest rate which was alleged to be usurious. In an early interpretation of virtually identical statutory language to that employed in 12 USCA, § 85, the Supreme Court held that the National Bank of Missouri could lawfully charge its customers a 10-percent interest rate and reasoned (85 U. S. [18 Wall.] 412, 21 L. ed. 683):

"* * * Coupled with the general spirit of the act, and of all the legislation respecting National banks, it is controlling. It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which was considered indispensable to protect them against possible unfriendly State legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same. On the other hand, if such associations were restricted to the states allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their existence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on, except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to National associations the rate allowed by the State to natural persons generally, and a higher rate, if State banks of issue were authorized to charge a higher rate. This construction accords with the

purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been National favorites. They were established for the purposes, in part, of providing a currency for the whole country, and in part to create a market for the loans of the General government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks."

The decisions reached in the Fisher cases injected a new attribute into the "most favored lender status," which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs. This result is accomplished despite the fact that the individual state has attempted to specifically limit the interest rates allowable on certain loan transactions and its laws apply uniformly to all lending institutions within the state. Thus, by allowing a national bank to transport a given interest rate under these circumstances could afford it a distinct advantage in competing with state banking institutions, an advantage which appears to be contrary to the original purpose in adopting this particular section of the National Bank Act.

However, we deem it inappropriate for this court to permit the use of procedural devices to obtain a result inconsistent with the existing doctrine in the Eighth Circuit. Consequently, we must reverse the district court's order which enjoins Omaha Service from operating the Omaha Bank's BankAmericard program by charging an interest rate in violation of § 48.185. Consistent with the reasoning in the Fisher cases, the Omaha Bank may assess an in-

terest rate to its BankAmericard customers in Minnesota which complies with the applicable Nebraska statutory interest rate. See, Neb. Rev. Stat. §8-820.

Finally, we observe that under the present situation it is the responsibility of the United States Congress to resolve the obvious inequities created. A national bank engaged in the interstate business of credit card financing should not be able to avoid the provisions of Minnesota law relating to allowable interest rates. The granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest of the state in protecting its citizens from excessive financing charges.

Reversed.

SHERAN, Chief Justice (concurring specially).

I agree with the result. I do not agree that the public suffers by application of the law in this case where users of credit cards now have a choice between competing suppliers.

SCOTT, Justice (dissenting).

I respectfully dissent. The original purpose of 12 USCA, § 85, of the National Bank Act was to prohibit states from discriminating against national banks in favor of local financial institutions. It was not intended to put "national banks on an equal footing with the most favored lenders in the state without giving them an unconscionable and destructive advantage over all state lenders." *First National Bank in Mena v. Nowlin*, 509 F. 2d 872, 880 (8th Cir. 1975). Section 85 thus was intended to insure *intrastate* competitive equality among state lenders and national banks.

The Fisher decisions and the majority of this court in-

interpret § 85 to apply in situations involving *interstate* transactions. These decisions and the majority would allow a credit card subsidiary of a Nebraska national bank to have rights greater than those enjoyed by national banks located in Minnesota. The shield of the Act has thus been turned into a sword which can now be used by national banks located outside Minnesota against local national banks. National banks located outside Minnesota would not only have most favored lender status in Minnesota, but rights greater than the most favored lender. Surely this result is not within the contemplation of the National Bank Act.

As the majority opinion states, "The decisions reached in the Fisher cases injected a new attribute into the most favored lender status,' which resulted in allowing the interstate shipment of interest rates by national banks in their credit card programs." Additionally, should a simple credit card transaction between a local citizen and a local merchant be construed as a bank loan by the Nebraska bank to a Minnesota citizen as Fisher proclaims without question? Minnesota should reject such an extension as a misinterpretation of the National Bank Act¹ and exercise its own judgment. In such matters we are not bound by the Federal circuit court cases but only by holdings of the United States Supreme Court.² E.G., United

¹The trial court, in its order of December 22, 1976, stated: "To take a statute that has been on the books for almost 100 years and find in that law an intention, in 1976, to nullify a financial practice of 200 years standing is ludicrous and makes a mockery of the doctrine of legislative intent. If there be any intent in Congress it must be to preserve the financial customs of so long a standing in our Republic."

²"While a decision of a federal court, other than the Supreme Court, may be persuasive in a state court on a federal matter, it is, nevertheless, not binding, since the state court owes obedience to only one federal court, namely the Supreme Court." 1B Moore, Federal Practice, Par. 0.402[1], p. 65 (2d ed.).

States ex rel. Lawrence v. Woods, 432 F. 2d 1072, 1076 (7 Cir. 1970).

I would therefore affirm the trial court's issuance of the permanent injunction against Omaha Service prohibiting the solicitation of credit card customers in Minnesota as a violation of Minn. St. 48.185.

YETKA, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

WAHL, Justice (dissenting).

I join in the dissent of Mr. Justice Scott.

Endorsed

Filed November 10, 1977

John McCarthy, Clerk

Minnesota Supreme Court

APPENDIX G**ORDER**

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that

1. The petition of respondent Marquette National Bank of Minneapolis for rehearing is denied.

2. The original opinion is amended by deleting therefrom the following language appearing on page 8 of the court's opinion, to-wit:

"By dismissing the Omaha Bank as a defendant, Marquette apparently intended to, and actually did, avoid a result that appeared to be predetermined if the case had remained in the Federal court system."

3. Respondent Marquette National Bank is herewith granted a stay of judgment pending application for writ of certiorari to the United States Supreme Court. The stay is conditioned upon the filing of a bond in the amount of \$10,000 with this court, approved by one of the justices of this court. The stay is further conditioned that if Marquette National Bank fails to make application for writ of certiorari with the United States Supreme Court within the time period allotted therefor or fails to obtain an order granting its application or fails to make its plea good in the United States Supreme Court, it shall answer for all

damages and costs which the appellant First of Omaha Service Corporation may sustain by reason of the stay.

Dated: December 8, 1977.

BY THE COURT:

JOHN TODD

Associate Justice

APPENDIX H

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order and judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin be and the same hereby is in all things reversed.

And it is further determined and adjudged that appellant herein, do have and recover of respondent The Marquette National Bank of Minneapolis herein the sum and amount, of Ninety-Four and no/100 DOLLARS, (\$94.00) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed December 14, 1977.

BY THE COURT:

Attest:

JOHN McCARTHY
Clerk.

APPENDIX I

In the District Court of the First Judicial District
of the State of Montana

In and For the County of Lewis and Clark

The Colorado Bank of Denver, a national banking association,

Substituted Plaintiff,

vs.

H. W. Coder,

Defendant.

H. W. Coder, on behalf of himself, and all others similarly situated,

Counter-Claimants,

vs.

The Colorado National Bank of Denver, a national banking association,

Substituted Counter-Defendant.

No. 34682

Opinion Accompanying
Findings of Fact and Conclusions of Law
and
Partial Summary Judgment

Two principal questions are presented by Coder's motion for summary judgment on his counterclaim:

1. Could Montana's usury law (Sections 47-124 and 47-125, RCM 1947) be applied to the Colorado

National Bank of Denver (CNBD) Bank Americard transactions in Montana prior to July 1, 1971, and

2. If Montana's usury law applies, could CNBD be relieved of its application by the provisions of our act specifically authorizing and limiting rates of interest chargeable by Montana banks (Section 5-527, RCM 1947) or by the provisions of our Consumer Loan Act (Chapter 2, Title 47, RCM 1947) or our Retail Installment Sales Act (Chapter 6, Title 74, RCM 1947)?

These questions will be considered in the order stated.

The Tiffany case (*Tiffany v. National Bank*, 18 Wall 409, 21 L.Ed. 862), handed down by The U. S. Supreme Court in 1874 (ten years after passage of the National Banking Act, from which Sections 85 and 86 of Title 12 USC derive), was argued by CNBD as authority for the proposition that a national banking association can charge whatever interest rate is permitted by the state in which it is located. CNBD is located in Colorado, which has no statutory limitation on the interest rate banks can charge. Coder, citing the Meadow Brook case, (*Meadow Brook National Bank v. Recile*, D.C. La. 1969, 302 F. Supp. 62) decided 95 years after Tiffany, argues that while 12 USC 85 expressly permits national banks to charge interest at the rates permitted by the state banks of the state in which the bank is located, it does not permit the national banks to carry on piracy on the high seas of finance by locating in a state with no interest limitations and, using that state as a base, invade and evade the usury laws of all the other states. If the position of CNBD is sustained, national banks located in non-usury states

need not heed the usury laws of any state. I would construe state usury laws as an exercise of the police power reserved to the states. If CNBD's position is sustained, it would act as a nullification of that police power.

I cannot conceive this to be the intent of Congress in passing the National Banking Act. There is, I believe, concurrence of counsel in this case and amongst authorities on banking law in general that the purpose of the National Banking Act was to maintain national banks on a competitive basis with the banks in the state where they are operating. If the position of CNBD were to be sustained, it would not merely be in a competitive position with Montana banks, it would be in an oppressively advantageous position.

The U. S. district judge writing the Meadow Brook decision adopts this interpretation of 12 USC 85. Following the explication of his rationale, beginning at page 73 of the Federal Supplement, this judge held, at page 75:

"We hold that 12 U.S.C. § 85 fixes the rate of interest chargeable by a national bank only as to loans made in the state where the bank is located; it does not fix the rate of interest which may be charged by a national bank which is located in one state and makes a loan in another state."

In this case, I believe the loans were "made" in Montana. They were initiated by the borrower in Montana by using his CNBD Bank Americard. There is no evidence the borrower dealt with anybody but the Montana merchants from whom he made his credit purchases. The borrower didn't ask for credit, he received his credit card in the mail, presumably at his Montana business or residential

address, without even applying for it. A Montana bank processed the loans and gave the Montana merchants credit. In doing so, the Montana bank was acting as part of a vast agency network set up in this state, consisting of banks and merchants, many of whom had no agreement with CNBD at all, which network was instigated and supported in this state by CNBD and the whole Bank Americard system. Apparently CNBD insists it can collect the loan in Montana by the use of Montana courts. CNBD maintains, however, that because final, technical approval of individual loans was in Denver, and because payments were to be submitted to its Denver headquarters, it is immune from the effect of our usury laws. Application of modern and evolving conflicts of laws doctrine would require a conclusion that the loan should be viewed as having been made in Montana and that Montana law should therefore apply (See Restatement referred to in Conclusion of Law #7).

The law and the letter advices of the Controller of the Currency relied on by CNBD are definitive on the point made in the Tiffany case and stated in the statute to the effect that national banks are permitted to exact interest rates in accordance with the rates set by the law of the state in which the bank is located. They are not definitive, however, as to what rate limitation applies in those cases where the loans are made in a state other than that in which the bank is located. The only definitive authority on this point brought to the attention of the Court is the Meadow Brook case urged by Coder.

Applicability of Montana Interest Statutes.

CNBD argues that even if Montana law is applied, the Tiffany case and those following it permit the federal

bank to charge the highest interest rate permitted any lender under Montana law, particularly banks lending under Section 5-527, RCM 1947, and others lending under the Consumer Loan Act (Ch. 2, Title 47, RCM 1947) and the Retail Installment Sales Act (Ch. 6, Title 74, RCM 1947). Once again, CNBD is in this way attempting to place the federal bank in a preferred position in relation to state banks because state banks could not have charged interest on revolving loans, such as those made under the Bank Americard system, at the rates permitted by these three special statutes during the period covered by the loans in question. This could not have been the intent of Congress, it was all too clearly not intended by the Montana legislature and it should not be condoned by a Montana court.

The central question is whether Congress has given federal banks the authority to meet any and all competition in the money market or whether that authority is limited to meeting the competition of state banks and comparable institutions under the applicable state law. I hold with the latter view, despite considerable authority, particularly from the Controller of the Currency, to the contrary.

No Montana bank, or any other lender can make revolving account loans at the rates laid down in the 1969 amendment to Section 5-527, RCM 1947. That amendment deals with deferred installment loans, not revolving account loans. The distinction is well established in banking practice and law. For example, the 1971 amendment to the Retail Installment Sales Act describes a revolving account loan in its definition of a "retail charge account agreement" (Section 1, Ch. 416, L 1971). The principal

distinction between the two types of loans is that the deferred-installment loan provides for the lending of a sum certain at pre-computed interest, payable in definite installments. The revolving account loan provides for lending from time to time at a pre-determined rate with computation of interest from time-to-time on the balance of the account. On its face, the 1969 amendment to Section 5-527, RCM 1947 does not deal with or authorize this kind of loan, it deals exclusively with, by its own terms, installment loans. Our statutory definition of banks is broad, it includes many types of banks (Section 5-102, RCM 1947); these banks may make installment loans at the rate now set forth in Section 5-527, RCM 1947, so can federal banks, but none of them can make revolving account loans under that statute. Thus on revolving account loans, such as those made by CNBD to its Bank Americard holders, CNBD had to meet no real Montana competition from any comparable type of institution. Thus CNBD was not entitled to charge under that statute on any kind of competitive theory.

Nor did CNBD face competition from Montana banks and comparable institutions under the Consumer Loan Act (Chapter 2, Title 47). Such institutions, including federal banks, were, and are, specifically excluded from the provisions of that act (Section 47-204, RCM 1947). Again, this act, even after the 1971 amendments, dealt with loans "generally repayable in substantially equal installments," not revolving account loans. (Section 47-202 (e)). Thus this statute deals with a distinctly different kind of loan. This, in addition to the fact that Montana saw fit to specifically exclude all banking-type institutions from the statute's applicability.

Finally, we are concerned with the competition CNBD might have faced under the Retail Installment Sales Act. (Ch. 6, Title 74, RCM 1947) This act was amended by the 1971 legislature (Chapter 416, L. 1971) to become effective July 1, 1971 (Section 3). The act was extensively amended to include retail credit card transactions of the kind we are concerned with here. (See numerous amendments in the session laws.) Prior to amendment, the lending of money by "banks or other lending institutions" was specifically excluded from the act's application. See Chapter 416, L. 1971, Section 1, Subsection (s)). And a careful reading of the act prior to amendment will reveal that it was intended to cover only retail installment transactions, not, as amended, charge account or credit card agreements. All of the transactions involved in this case were completed prior to the effective date of these amendments. Thus, again, CNBD was not, under this act prior to amendment, faced with any kind of authorized competition on the kind of loan it was making to its credit card holders either from any banking institution or from any other kind of agency.

For the above reasons, I conclude that CNBD in its transactions with Coder was not meeting any kind of authorized competition from Montana banks and other lending agencies and was therefore bound by the limitations imposed by our usury statutes, Sections 47-124 to 47-125, RCM 1947.

Dated this 29th day of December, 1972.

/s/ GORDON R. BENNETT
District Judge

MAR 29 1978

MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1977

No. 77-1265

THE MARQUETTE NATIONAL BANK OF MINNE-
APOLIS,

Petitioner,

vs.

FIRST OF OMAHA SERVICE CORPORATION and
STATE OF MINNESOTA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MINNESOTA

REPLY IN SUPPORT OF CERTIORARI

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I.

**PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI
WAS TIMELY FILED**

Respondent, First of Omaha Service Corporation, argues (P. 5 of Respondent's Brief) that the Petition for Writ of Certiorari filed by Petitioner, The Marquette National Bank of Minneapolis (hereinafter sometimes called "Marquette"), with the United States Supreme Court on March 13, 1978, was not timely filed.

Under 28 U.S.C., §2101(c) (R App. A-1)¹ the period of time allowed for filing a Writ of Certiorari is 90 days from entry of judgment. 28 U.S.C., §2101(c), provides:

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within 90 days *after the entry of such judgment or decree.* * * *"
(Emphasis added).

The judgment of the Minnesota Supreme Court became final on December 14, 1977, when judgment was entered in this matter. It is from that date that the 90 days must be counted and the Petition for Writ of Certiorari filed by Marquette on March 13, 1978, with the United States Supreme Court was timely filed. Prior to December 14, 1977, no judgment of the Minnesota Supreme Court had been entered.

It should be noted that on November 10, 1977, the Minnesota Supreme Court rendered its decision (P App. A-29). Marquette then filed a Petition for Rehearing with the Minnesota Supreme Court which had the effect of staying entry of Judgment. Rule 140, Minnesota Supreme Court Rules (P¹ App. A-1). By Order dated December 8, 1977, the Minnesota Supreme Court denied the Petition of Marquette for rehearing. (P App. A-48). On December 14, 1977, judgment of the Supreme Court of the State of Minnesota was entered (P App. A-50) pursuant to Rule 136.02, Minnesota Supreme Court Rules (P¹ App. A-1).

¹References to the appendix herein will be set forth as P App. for the appendix filed by Petitioner as part of its original Petition, R App. for the appendix filed by Respondent, and P¹ App. for the appendix made a part of this Reply Brief.

The Minnesota Supreme Court decision rendered on November 10, 1977, did not become final until entry of judgment on December 14, 1977, following denial by the Minnesota Supreme Court of Marquette's Petition for Rehearing on December 8, 1977. There was literally no judgment to appeal from, within the meaning of 12 U.S.C., §2101(c), until judgment was entered on December 14, 1977.

Rule 136.02 and Rule 140, Minnesota Supreme Court Rules (P¹ App. A-1) are substantially different from Rules 36 and 40 (a) of the Federal Rules of Appellate Procedure (P¹ App. A-2). The Clerk of a Federal Circuit Court of Appeals, under Rule 36, must prepare, sign and *enter* the judgment upon receipt of the opinion of the court and must mail on the date judgment is entered a copy of the opinion, if any, and notice of the date of entry of the judgment. Under Rule 40(a) of the Federal Rules of Appellate Procedure, a petition for rehearing must be filed within 14 days after *entry of judgment*. Minnesota Supreme Court Rules 136.02 and 140 provide that a petition for rehearing timely made *stays entry of judgment* and judgment shall be entered only after the petition for rehearing is decided.

Respondent, First of Omaha Service Corporation, cites *Citizens Bank of Michigan City v. Opperman*, 249 U.S. 448, (1919) (at P. 6 of Respondent's Brief) for the proposition that the decision of the Minnesota Supreme Court became "final" on December 8, 1977, when the Minnesota Supreme Court rendered its decision denying Marquette's Petition for Rehearing. If judgment had been entered after the Minnesota Supreme Court decision rendered on November 10, 1977, but prior to the Petition

for Rehearing, it would make sense under 28 U.S.C., §2101(c), to compute the 90 days from the date of denial by the Minnesota Supreme Court of Marquette's Petition for Rehearing since, under such circumstances, there would have been no further act necessary to make the judgment final. However, the Minnesota Supreme Court Rules do not follow the Federal Rules of Appellate Procedure or appellate rules of other state courts in providing for entry of judgment prior to a petition for rehearing, and hence the United States Supreme Court decision in *Citizens Bank of Michigan City v. Opperman, supra*, and other cases cited by Respondent, First of Omaha Service Corporation, at page 6 of its Brief, are inapposite.

The United States Supreme Court in *Puget Sound Power & Light Co. v. King County*, 264 U.S. 22 (1924) has made it quite clear that where state law provides for entry of judgment only after the highest state court has decided a petition for rehearing, the time for filing a petition for writ of certiorari to the United States Supreme Court under 12 U.S.C., §2101(c), runs from the date of entry of the judgment.

In the *Puget Sound* case, *supra*, the Washintgon Supreme Court sat in two departments and en banc. The second department rendered its opinion October 15, 1921. The case was reargued before the court en banc, which, in a per curium opinion filed June 12, 1922, approved the decision of the second department and affirmed the judgment. On July 10, 1922, judgment of the Washington Supreme Court was entered in the minutes of the court. Respondent, King County, argued that the time for computing the 90 days began to run from the filing of the per curiam opinion on June 12, 1922 (rather than from the

date of judgment entered on July 10, 1922) and that the period for filing a writ of certiorari (writ of error) thus expired on September 12, 1922, whereas the petition for writ of certiorari was not filed until September 22, 1922. The United States Supreme Court held that under the laws of the State of Washington, a decision of the Department of the Supreme Court of Washintgon did not become final until 30 days after it was filed, during which time a petition for rehearing could be filed. If no rehearing was asked for, or no order entered for a hearing en banc, in the 30 days, the decision became final. If a hearing en banc was ordered and had, the decision was final when filed; but in all cases when the decision became final, there was a specific provision that a judgment shall issue thereon. The United States Supreme Court said that however final the decision might be, it was not the *judgment* and that the time for appeal ran from the date of entry of judgment. To the same effect, see *Scofield v. National Labor Relations Board*, 394 U.S. 423 (1969).

II.

CONCLUSION

In view of the foregoing, Petitioner, The Marquette National Bank of Minneapolis, respectfully submits that it seasonably filed its Petition for Writ of Certiorari with the United States Supreme Court within the time permitted under 28 U.S.C., §2101(c), that is, within 90 days from date of entry of judgment by the Minnesota Supreme Court.

Respectfully submitted,

LEVITT, PALMER, BOWEN, BEARMON &
ROTMAN

By JOHN TROYER

J. PATRICK McDAVITT

*Attorneys for Petitioner The Marquette
National Bank of Minneapolis*

APPENDIX

Rule 136.02, Minnesota Supreme Court Rules.

136.02 *Entry of Judgment; Stay*

The clerk shall enter judgment pursuant to the decision or order not less than ten days after the filing thereof. The service and filing of a petition for rehearing shall stay the entry of the judgment.

Rule 140, Minnesota Supreme Court Rules.

Rule 140. *Petition for Rehearing.*

A petition for rehearing may be filed within 10 days after the filing of the decision or order unless the time is enlarged by order of the Supreme Court within the 10-day period. The petition shall set forth with particularity any controlling statute, decision, or principle of law, any material fact, or any material question in the case which, in the opinion of the petitioner, the Supreme Court has overlooked, failed to consider, misapplied, or misconceived. The petition shall be served upon the opposing party who may answer within 5 days thereafter. Oral argument in support of the petition will not be permitted. Thirteen copies of the petition, produced and sized as required by Rule 132.01, shall be filed with the clerk, except that any duplicated copy, other than a carbon copy, of a typewritten original may also be filed. A filing fee of \$25 shall accompany the petition for rehearing. The filing of a petition for rehearing stays the entry of judgment until dis-

position of such petition. It does not stay the taxation of costs.

Rule 36, Federal Rules of Appellate Procedure.

Rule 36. *Entry of Judgment*

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

Rule 40(a), Federal Rules of Appellate Procedure.

Rule 40. *Petition for Rehearing*

(a) *Time for Filing; Content; Answer; Action by Court if Granted.* A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received un-

less requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

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